No. 80-402

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J. P. STEVENS & CO., INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND
AMALGAMATED CLOTHING AND TEXTILE
WORKERS UNION, AFL-CIO,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MEMORANDUM FOR THE RESPONDENT UNION IN OPPOSITION

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REASONS FOR DENYING THE WRIT

Introduction

Rule 21.5 of this Court provides as follows:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

The Petition for Certiorari herein fails utterly "to present "whatever is essential to a ready and adequate understanding of the points requiring consideration" thereof. The Statement of the Case (Pet. 4-6)[1] does not identify any of the unfair labor practices which the Administrative Law Judge's Decision copiously detailed (Pet. App. A14-A117) in his findings and conclusions, which were affirmed by the Board. Nor does the Statement quote or describe the Court of Appeals' reasoning in affirming the Board's findings that petitioner had bargained in bad faith (*Id.* A142-A145). Since, as the Petition itself observes, an unfair labor practice remedy under § 10(c) of the National Labor Relations Act (hereafter called the "Act") "must be designed 'to undo the effects of the violations of the Act' " (Pet. 7), petitioner's failure to describe the unfair labor practices which were actually found, and their effects, prevents the Court from even considering its contention that the remedies adopted are excessive. And the petitioner's further failure to set forth (either in the Statement, or otherwise) the Board's reasoning in providing for, and of the Court of Appeals in sustaining, the challenged remedies leaves the Petition's argument without a predicate, and renders hollow, if not wholly misleading, the objection that the Court of Appeals "perfunctorily deferred to the Board's discretion in fashioning remedies" (Pet. 6).

A further deficiency in the Petition is that the formulation of the second Question Presented and the argument which urges its consideration by this Court leave unclear whether petitioner seeks review of the requirement that it bargain with the union prior to announcing or implementing corporate-wide changes only on the ground that this is an improper remedy, or whether the petitioner

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[1] "Pet." refers to the Petition for Certiorari herein; "Pet. App." refers to the separately bound Appendix to that Petition.

seeks to argue also, if *certiorari* is granted, that the underlying unfair labor practice determination (and its affirmance by the Court of Appeals) is erroneous.

Such noncompliance on the part of experienced counsel with this Court's Rule 21.5 (which retains the Court's prior Rule 23.4) does not appear to have been inadvertent. For, when the information omitted from the Petition is supplied, and the artful ambiguity is resolved, it becomes only too obvious that the Petition is wholly without substance.

I. THE FIRST QUESTION PRESENTED IS UNWORTHY OF REVIEW

As the Petition states, the access remedies which are challenged in the first Question Presented by the petitioner in this case are identical with those challenged in *J. P. Stevens & Co., Inc.* v. *NLRB*, No. 79-1637; and the Board's reasoning in that case was based on its decision in this case. This Court denied *certiorari* in No. 79-1637 on October 20, 1980, 49 U.S.L.Wk. 3289. The present challenge to the Board's access remedy contains nothing that was not anticipated by petitioner's presentation in No. 79-1637. Even the asserted conflict with *Florida Steel Corp.* v. *NLRB*, 620 F.2d 79 (5 Cir. 1980) (Pet. 7-9) was asserted by way of a Supplemental Brief in that case. Moreover, the reasoning of the Court below herein, which as we have previously noted is not set forth in the Petition, demonstrates both that this case is unlike *Florida Steel*, and that the remedy is well within the Board's powers.[2]

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[2] Pet. 9 quotes at length what are described as "recent remarks of the immediate former general counsel of the Board". The author, John Irving, is identified at the outset of the quoted report of his speech as a partner in the firm of Kirkland & Ellis, and is described in a summary thereof as "presenting a management perspective". Daily Labor Report No. 88, pp. F-1; A-9 (May 5, 1980).

The Court said:

> This provision of the Board's order is predicated on its finding that the company employed its unlawful bargaining strategy to chill the union's organization of other plants. The notice and access order is designed to counteract the use the company has made at other plants of its unfair labor practices in bargaining at Roanoke Rapids. Therefore the order is not punitive. It is designed to "effectuate the policies of the Act." *Virginia Electric & Power Co.*, 319 U.S. at 540; Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940). [Pet. App. A147-A148].[3]

II. THE SECOND QUESTION PRESENTED IS AMBIGUOUS AND UNWORTHY OF REVIEW

Repeated readings of the second Question Presented leave us uncertain whether, in addition to challenging the Board's remedial power to "require an employer to give notice and bargain with a union certified as the bargaining representative at one of the employer's locations, prior to the employer announcing or implementing corporate-wide changes in benefits at its unrepresented plants" (Pet., unnumbered page) or also challenges the underlying unfair labor practice determination. A reading of the argument (Pet. 12-17) provides no clarification. Rather, that argument carefully blends discussions of the substantive unfair labor practice provisions of the Act with objections to the Board's "remedy." See particularly *id.* at 14: "The imposition of such an unprecedented remedy far exceeds the Board's authority to oversee the collective bargaing process." This sentence is followed immediately by references to §§ 8(a)5, 8(d) and

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[3] Subsequent to the filing of the Petition for Certiorari the petitioner and respondent union entered into an agreement which resolves some of the controversies between them, and in which the union has agreed not to exercise, for eighteen months, the rights of access to which it is entitled under the Board's order. We do not rely on this fact as a further ground for denial of review, but mention it solely because of a felt responsibility to so inform the Court.

9(a) of the Act, and a decision of this Court which does not address the subject of remedies (and which does not even remotely touch upon the pertinent issues of this case). In any event, whether the attack be on the merits or on the remedy, the Court of Appeals' reasoning is entirely sound.

In sustaining the Board's unfair labor practice finding, the Court said:

> As amended the complaint charged, and the Board found, that during negotiations the company instituted corporatewide changes respecting profit sharing, wage rates in 1975 and 1976, and a group insurance program. Despite requests for information concerning these mandatory subjects of bargaining, the company withheld relevant information and announced or implemented the changes at a time and in a manner that precluded realistic bargaining at Roanoke Rapids. Referring to the company's conduct, the Board said:
>
> > [I]n four separate instances [Stevens] engaged in a bargaining strategy violative of Section 8 (a) (5) of the Act. This tactic consisted of developing comprehensive improvements in corporatewide benefit programs, keeping the Union in the dark regarding information necessary and relevant for purposes of collective bargaining, and timing the announcement or implementation of these changes to preclude any meaningful negotiation concerning their implementation at the Roanake Rapids facility.

There can be no doubt that this conduct violated § 8 (a) (5). NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); NLRB v. Katz, 369 U.S. 736 (1976). Besides, the Board detected in this bargaining strategy more than isolated unfair labor practices. Finding that the union's choice of either accepting or rejecting these unilateral changes was in fact illusory, the

> Board observed: "The record . . . clearly demonstrates that this tactic was a most effective means of undermining the collective-bargaining process and denigrating the union's status as collective-bargaining agent." The Board therefore held that "these violations go to the very heart of the Act and our national policy." We find no error in the Board's assessment. Indeed, the company's essentially similar tactic in bargaining at its Statesboro plant was deemed contemptuous in NLRB v. J. P. Stevens & Co., 538 F.2d 1152, 1163-64 (5th Cir. 1976)). [Pet. App. A143-A144]

And in approving the Board's remedy for this violation the Court said:

> We also find no occasion to set aside that portion of the order requiring the company to give notice of proposed systemwide changes, furnish information, and bargain with the union regarding the contemplated changes for the unit at Roanoke Rapids. Contrary to the company's assertion, this provision does not require it to bargain over benefits for unrepresented employees. The order is specifically limited to the Roanoke Rapids plant. If, as a result of bargaining, a company proposal is modified, nothing in the order requires the modified version to be implemented at plants where the union is not the bargaining repreesntative. The company retains the option to adopt or reject the results of bargaining at its other plants. *Cf.* Hollywood Brands, Inc., 142 NLRB 304 (1963), *enforced*, 324 F.2d 956 (5th Cir. 1964). (Pet. App. A148]

While the Petition can ignore the above-quoted analyses, it cannot present anything to show that either the merits or the remedy issues which the court decided warrant further judicial attention.

III. THE THIRD QUESTION PRESENTED IS UNWORTHY OF REVIEW

The third Question Presented by the Petition asks this Court to determine as a matter of law that the NLRB is wholly without power to award litigation and negotiation expenses to a union as a remedy for unfair labor practices (Pet. 17-20). Since the Court of Appeals remanded that issue to the Board for clarification of its reasoning (Pet. App. A152), the fact that the petitioner chooses to present the naked legal issue now may reflect petitioner's appreciation that if the Board has power to award such a remedy in any circumstances, Stevens' "litigation history" [4] would warrant its imposition against it. Considerations of prematurity aside, the petitioner's legal argument is baseless. Again, the Court of Appeals' resolution of the issue is correct and dispositive:

> At the outset we dismiss the statutory argument. Section 186 was intended to prevent corruption by labor and management, and it does not apply to Board decision swhich are enforced through court order. *See* 29 U.S.C. § 186(c)(2). [Pet. App. A149][5]

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[4] Petition for Certiorari in No. 79-1637, at p. 7.

[5] While we disagree completely with the Petition's characterization of "the primary purpose of the Act" and its citation in this connection of *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, the issue is academic in the present context, because there is no basis for supposing that if the Board's authority to award attorneys' fees were ultimately sustained, that remedy would not be applied evenhandledly against employers and unions.

CONCLUSION

For the foregoing reasons and those stated in the Brief for the National Labor Relations Board in Opposition, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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